

*California Lawyer Magazine*  
“Realizing Kindness”  
by Mary H. Mocine

Being kind in an adversary system can be an act of courage. This is particularly true in the arena of law. Lawyers are trained to be zealous advocates. Our adversary system is how we get at the truth. But we may pay a high price in terms of stress, personal relationships, and ultimately professional success if we submit to the temptation to forget our common humanity and play the anger-escalation game.

It is difficult to imagine being kind, particularly if we practice litigation. We fear being seen as a push-over. We think, “Perhaps I will lose the motion, or even the case. Maybe my clients will look elsewhere if I don’t adequately represent their angry self-righteousness. Perhaps I won’t obtain the best possible outcome for my client. If I am not aggressive enough in cross-examination, maybe the truth will never come out. If I am too kind, maybe everything will work out too easily and I won’t generate enough billable hours. Maybe I’ll never make partner because I’m seen as a wuss.”

However, the kindness I speak of is a radical kindness. It is not the kindness of tea parties. It is beyond our usual ideas of kindness. Radical kindness includes being fierce when that is appropriate. It includes setting boundaries. It includes being flexible, thinking outside the box of our assumptions. I propose that we ask ourselves, “What would it be like if I practiced law in a humane manner, from the base of my deepest values?”

I make a distinction between being fierce and being angry. When we are angry, we tend to be thoughtless and want revenge. We may well be avoiding noticing that we are frightened underneath the anger. None of this is useful. Nevertheless, sometimes it is necessary to assert yourself strongly. When your child darts into the street, the kind thing to do is to be fierce—to grab a wrist or yell, “Stop!” This is not anger; it is simply an appropriate response.

I remember an appropriately fierce response from an experience in law school in the late ’60s. My torts professor liked to call on students and grill them. When he did not get the answer he wanted, he would launch into a diatribe against the offending student. On this particular day, a student did not answer a question to the professor’s liking, so he began to berate the man, railing about “your generation.” The student listened until there was a slight pause and then said, in a calm tone,

“Professor, I have not been rude to you. I am an adult, and I have served my country in the armed forces. I do not like being talked to in this way. I find it offensive and uncalled for.” The professor was visibly surprised. He apologized. The student had stood his ground and put forward his position. In doing so, he did a real kindness to the professor and to all of us in the class. I felt much less intimidated by the professor after that exchange. Also, I could begin to see him as a human being. The professor received a chance to see himself as others saw him and to change his rude behavior.

Being radically kind does not mean that you can never seek sanctions, for example. It does mean that you would not make a decision in anger and that you would not take pleasure in it. Or, when you do take pleasure in it, as all of us do from time to time, you notice it and remind yourself that you do not really want to cause suffering. This first became clear to me when I was an associate for a plaintiff's personal injury firm in San Francisco in the early 1970s. I could not get answers from opposing counsel in one case, despite repeated agreements to supply them. Even a motion to compel was granted, but still I got no answers. Finally I filed for sanctions. That motion resulted in the answers finally coming forth and in opposing counsel giving my firm a personal check for \$100. I returned to the office crowing about my victory. The senior partner reminded me that opposing counsel was probably suffering in some way and gently reprimanded me for gloating about another's misfortune. I never forgot that lesson.

It is necessary to set boundaries when you practice law. I recently met an attorney who worked at an insurance defense firm that represented insurance companies in bad faith cases. Her firm also did asbestos defense work. She told me that it is common for plaintiff's counsel to conflate her with her client and to vilify her. Her response is to remain grounded in her own values. She sets a boundary and simply refuses to let opposing counsel define her reality. She continues to be civil. She refuses to cause more suffering by responding similarly. She does not escalate the anger. Eventually, the atmosphere calms and the exchange becomes civil. Cases can then settle or be litigated in a more humane atmosphere.

To respond with radical kindness, you must sometimes go through the process of letting go of your assumptions and taking a new look. When we hold on to assumptions, we may create big problems, or even lose cases. An attorney I know in the transactions department at a big San Francisco firm was involved in negotiations regarding a product that his client had developed. His client usually dealt with the government, which typically pays for development, although the developer owns the final product. The other party to the deal was used to negotiating in the

private sector, where the situation is the reverse: The company that pays for development owns the final product. The differing assumptions did not become clear until a written draft of the contract was exchanged. Both sides felt betrayed. Tempers flared. The deal was almost abandoned. But the client did something remarkable. He decided to look at the situation without his assumptions. He thought about what was really important. He and his attorney looked anew at the problem and came up with a creative solution that satisfied everyone.

Sometimes we can get lost in the adversary process. We forget that we are all human beings dealing with other human beings. The first Microsoft settlement negotiations are a case in point. Ken Auletta described the process in an article he wrote in the *New Yorker* magazine. As is well known by now, the trial judge, Thomas Penfield Jackson, referred the case to Judge Richard A. Posner, chief judge of the Seventh U.S. Circuit Court of Appeals, for mediation. Judge Posner followed the usual practice of mediators and kept the parties separate. The case came very close to settlement. Auletta concluded that by the end of the process, Bill Gates truly wanted to settle. However, the negotiations fell apart, partly because of a lack of trust. Auletta points to the lack of simple human interaction as a possible cause for the failure:

Later, lawyers on both sides wondered whether Posner had made a mistake in keeping the principals apart throughout the mediation effort. With little personal contact, it was hard for [Bill] Gates and [Assistant Attorney General Joel] Klein and their lieutenants to think of their adversaries as flesh-and-blood human beings, and not demons. Perhaps Posner's dry, intellectual approach to legal issues ruled out the human factor, which can build trust, as well as erode it."

A few years ago, the humanity of an arbitrator made a difference for me in my practice. My mother had just died, and my father was ill. I had two arbitrations scheduled soon after my mother's death. But I needed time to deal with my family. I called each of the arbitrators. One insisted on his \$500 postponement fee. The other simply said "Of course. I'm sorry about your loss." He later needed some accommodation when his wife was about to have a baby. I was happy to assist him. As to the first arbitrator, I never used him again.

A friend of mine is a founding partner in a medium-size litigation firm in San Francisco. He is a tough litigator, but he practices law in a humane manner. He tells me that he avoids getting too angry, too bound-up in his cases, by noticing when he is in danger of overreacting. He figuratively takes a step back and asks himself, "What is really important to me?" He calms down by remembering that he values

being a decent human being. But he still sets boundaries and strongly advocates for his position. He does not, however, take disputes personally, nor does he participate in the hostility that is endemic to our profession these days.

We can retain our humanity, even in our adversary system. It is possible to disagree, to be a zealous advocate, without acrimony. If opposing counsel acts like a petty jerk, that need not constitute license to respond similarly. What a great kindness it would be to yourself, your clients, and opposing counsel if you declined to play the anger-escalation game. Consider, instead, a response grounded in your deeper values, values that express what sort of human being you intend to be. Consider, instead, practicing radical kindness.

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